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SUPREME COURT, U.S.

NO. 85-553

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RALPH KEMP, WARDEN,

Petitioner,

-VS-

WILLIAM ANTHONY BROOKS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED

I. Whether this Court should grant plenary review to decide whether the Court of Appeals, after conducting a thorough review of the record, correctly applied the federal harmless error rule to a clear violation of Sandstrom v. Montana, 442 U.S. 510 (1979)?

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* Indicates cases upon which Respondent primarily relies.

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STATEMENT OF THE CASE

The charges against Respondent which led to his convictions and sentences he challenged in the courts below arose out of the abduction of Carol Jeannine Galloway, a piano teacher and director of the choir at a Methodist Church in Columbus, Georgia, from her home on July 15, 1977. Respondent, who is Black, was tried by an all-white jury in Columbus, Georgia on November 15-18, 1977. He was convicted of murder, armed robbery, kidnapping and rape. He was sentenced to death by the jury on November 18 for the murder. He was also sentenced to a term of life imprisonment for both armed robbery and rape, and to a term of twenty years for kidnapping, all of the sentences to run consecutive to each

other.

The State presented evidence that the victim was approached at her home and taken to a wooded area in her own car, which was later found near the site where the body was found. Tr. 483-85, 494, 499-512, 514-15. The medical examiner testified that he performed an autopsy and found that the death was caused by internal bleeding due to a laceration of the lung resulting from a single bullet wound to the neck. Tr. 591-92. He also testified that his examination found evidence of trama to the vaginal area consistent with forced sexual intercourse. Tr. 596-97.

Two statements made by Respondent to the police were introduced at trial. According to one, after the victim was forced to submit to sexual intercourse, she began to scream; Respondent pulled the hammer back on the pistol and pointed it at her. He then told the police that the gun just "went off and hit her." Tr. 759.

After arguments of counsel, the jury heard the charge of the court. Among other things, the trial court charged the jury on malice, an element of murder in Georgia, in the following terms: "[t]he law, ladies and gentlemen, presumes every homicide to be malicious until the contrary appears from the circumstances of alleviation, excuse or justification, and it is incumbent upon the accused to make out such circumstances to your satisfaction unless they appear from the evidence produced against him." Tr. 831. Further recognizing that the state's evidence describing how the victim was shot came solely from Respondent's statement to the police, the trial court also charged the jury that Respondent would not be guilty of murder with malice aforethought if the shooting was the result of "misfortune or accident". Tr. 828.

The decision of the Court of Appeals applies only to the murder charge. Respondent was not granted a new trial with regard to his other convictions.

REASONS FOR NOT GRANTING THE WRIT

I. THE QUESTION OF WHETHER THE COURT OF APPEALS CORRECTLY DECIDED WHETHER THE SANDSTROM V. MONTANA ERROR WAS HARMLESS DOES NOT MERIT REVIEW BY THIS COURT BECAUSE THE COURT BELOW CAREFULLY AND THOROUGHLY EXAMINED THIS ISSUE AND REACHED THE CORRECT RESULT

Petitioner, in his Petition for Writ of Certiorari, seeks plenary review from this Court of a purely factual issue having no impact upon any case but this one -- whether the court of appeals below correctly applied the federal harmless error test to a clear violation of Sandstrom v. Montana, 442 U.S. 510 (1979). For the following reasons, this Court should decline the request of Petitioner and deny review.

First, this Court has repeatedly remarked that the question of whether a constitutional violation is harmless in a given case "is a question more appropriately left to the courts below." Connecticut v. Johnson, 460 U.S. 73, 102 (1983)(Powell, J. dissenting). And where the Court decides to review such a finding by a lower court, the primary task "is to ensure that the court undertook a thorough inquiry and made clear the basis of its decision." Francis v. Franklin, ___ U.S. ___, 105 S.Ct. 1965, 1977 n.10 (1985). In this case, the finding that the Sandstrom error was not harmless was made by the en banc court after careful review of the record facts and the contentions of both parties. See, Brooks v. Kemp, 762 F.2d 1383, 1390-1394 (11th Cir. 1985)(en banc). Because Warden Kemp's petition fails to present a question which satisfies Rule 17 of this Court's rules, this reason alone justifies denial of the petition.

Second, this case does not present the one question which this Court has yet to determine in the area of burden-shifting instructions -- whether such instruction can ever be harmless. See, Connecticut v. Johnson; Engle v. Koehler, 707 F.2d 241 (6th Cir. 1983), aff'd by an equally divided Court, ___ U.S. ___, 104 S.Ct. 1673 (1984); Francis v. Franklin, 105 S.Ct. at 1977; Kemp v. Davis, ___ U.S. ___, 105 S.Ct. 2689 (1985)(White, J., dissenting from denial of certiorari). The Court below, assu-

ming that a burden-shifting charge can be harmless under certain circumstances, nevertheless concluded that the charge in this case was not harmless after a careful examination of the facts in this case. Were this Court to grant review of the petition and later conclude that such error cannot be harmless, it would not change the outcome of this matter, but would merely recast the reason for granting relief. Moreover, this Court has recently granted certiorari in another case involving Sandstrom error. Rose v. Clark, No. 84-1974, 38 CrL 4014 (October 7, 1985).

Third, plenary review should not be granted in this case because, assuming arguendo a burden-shifting charge can ever constitute harmless error, the court below correctly decided this issue. After taking a hard look at all the record facts, the en banc court of appeals concluded that the burden-shifting charge on malice, an essential element of murder, was not harmless. The issue framed by the evidence and the trial court's instructions was whether the killing of the decedent was malicious or accidental. This was a close question and the instruction shifting the burden on this key element could not possibly have been harmless.

The victim of the homicide suffered a single gunshot wound to the throat, which was the sole cause of death. The only account of how the victim was shot was contained in Respondent's statement which was introduced at the trial. In it, Respondent asserted that he did not intend to shoot the victim, but pointed the gun at her and pulled the hammer back to quiet her after she began screeming. While doing so, he stated, the gun "went of and hit her." Tr. 759. As the prosecutor acknowledged in closing argument, the clear implication of the statement was that the shooting was accidential, not malicious.

> Now one other thing Judge Land is going to charge you on, in his statement to Detective Lynn, he [Respondent] said that she was saying let me go, and screaming, and he took his gun out and pointed it at her, tried to make her hush, you will recall that, and that he pulled the hammer back, and the gun went off. He doesn't say it was an accident, but he leaves that implication. And, the Court is going to charge you on accident. We say that when you're

> in that kind of situation, and you've got your finger on the trigger and you point the gun at somebody, you pull the hammer back, it ain't no accident. He had to pull the trigger or the gun wouldn't go off, and he meant to kill her, or he wouldn't have done it.

Tr. 819. The trial court, based upon the facts supporting a theory of accidental shooting, charged the jury that it should acquit Respondent if it found that the shooting was committed "by misfortune or accident". Tr. 828. Thus, the issue was squarely before the jury and closely contested. In such circumstances, an instruction which relieved the state of the burden of proving malice could not be harmless.

Ignoring the foregoing, Warden Kemp's petition urges this Court to believe that the issue of malice was never before the jury. However, in the court below, the Warden conceded both before the panel and the en banc Court that the issue of whether the shooting was committed with malice was very much an issue.

> [Brooks] admitted to the police that he raped the victim, but stated that he only put the gun to her head to scare her. He then stated that it just somehow went off. If the jury believed this portion of the statement by the Appellant, the the jury would be obligated under the charge of the court to find [Brooks] not guilty by virtue of a defense of accident or misfortune.

Warden's Brief before panel at 58; Warden's Brief before en banc Court at 30. Upon this record, and while carefully following this Court's recent decision in Francis, the Court of Appeals concluded that the defective charge forced Respondent "into the position of having to disprove malice" which "as reflected by Brooks' statement to the police, . . . was the only issue, in practical effect, subject to dispute with respect to the malice murder charge". 762 F.2d at 1393.

As this Court's "primary task" in reviewing harmless error determination made by the lower courts is to "ensure that the court undertook a thorough inquiry and made clear the basis of its decision", Warden Kemp's petition presents an issue wholly unworthy of plenary review. This Court should accordingly deny the petition.

Conclusion

For the foregoing reasons, this Court should deny Warden Kemp's request to grant the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon Respondent by depositing copies of same in the United States Mail, with proper first class postage affixed thereto, addressed as follows:

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This the 29th day of October, 1985.

ATTORNEY FOR PETITIONER